LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 6 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~1155~~ 112

GEORGE LEVINE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NICHOLAS J. CAPUANO of
LURIE & CAPUANO
1409 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioner

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	3
Statement of the Case	3
Reasons for Granting the Writ	4
Certification of Service	6
Appendix A — Opinion Below	7
Appendix B — Letter Denying Rehearing	21
Appendix C — Petition for Rehearing	23
Appendix D — Brief of Appellant	33
Appendix E — Order Staying Mandate	75
Appendix F — Order Denying Rehearing	77
Appendix G — Judgment	79
Appendix I — Constitution of the United States, Fifth Amendment; Title 15, United States Code Annotated, Section 77q(a); Title 18, United States Code Annotated, Section 1341; Title 18, United States Code Annotated, Section 871; Rule 24, paragraph (b), Federal Rules of Criminal Procedure	80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No._____

GEORGE LEVINE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now George Levine, petitioner herein, by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 11th day of March, 1965, and the order of the same Court denying rehearing entered on the 9th day of April, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A. hereof and the advice to counsel as to the order denying rehearing is found in Appendix B. hereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37 (b) (1) .(2) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 11th day of March, 1965, (Appendix A.), and thereafter a petition for rehearing was timely filed (Appendix C.), and thereafter the said Court entered its order denying rehearing without opinion (Appendix B.).

QUESTIONS PRESENTED

I

Whether or not the trial court committed reversible error in denying appellants' motion to disqualify the juror Mrs. Lewis for cause and for denying appellants' motion to grant additional peremptory challenges.

II

Whether or not the trial court committed reversible error in its charge to the jury wherein the trial court stated as follows: "The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . they should be put up on their trial . . . and unless they answer they should be convicted."

III

Whether or not the trial court and Circuit Court of Appeals for the Fifth Circuit committed reversible error in failing to dismiss and set aside all substantive counts pertaining to the appellant George Levine alleged to have

been committed prior to July 22, 1960, the date that the Government alleges in its indictment that the appellant George Levine entered into the scheme.

STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment; Title 15 United States Code Annotated, Section 77q(a); Title 18 United States Code Annotated, Section 1341; Title 18 United States Code Annotated, Section 371; Rule 24, paragraph (b), Federal Rules of Criminal Procedure. Text of the same are set forth in Appendix I hereof.

STATEMENT OF THE CASE

Your petitioner George Levine was accused jointly with ten other co-defendants of violating the anti-fraud provisions of the Securities Act of 1933. The indictment contained five counts setting forth violations of Title 15 U.S.C. 77q(a), four counts setting forth violations of Title 18 U.S.C. 1341, and one count of conspiracy to violate the corporate security and mail fraud laws in violation of Title 18 U.S.C. 371.

The indictment further charges your petitioner George Levine gained control of the Credit Finance Corporation on July 22, 1960, and prior to that time he had nothing to do with this whole operation.

That thereafter a jury trial was had and evidence was presented to the jury, a more complete and thorough statement of the evidence presented to the jury is contained herein in Appendix D. Your petitioner was found guilty of ten counts and after adjudication of guilt, was sentenced to fifteen months imprisonment on each count consecutively or a total sentence of twelve and one-half years.

In a normal manner the cause came on for oral argument before the United States Court of Appeals and thereafter the opinion of the Court (Appendix A.) was entered on the 11th day of March, 1965, and that thereafter a petition for rehearing was timely filed and subsequently the Court of Appeals entered its order denying rehearing without opinion (Appendix B.).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ sought by your petitioner should be granted for the reason that the decision of the Fifth Circuit of *Sherwood v. United States*, 300 F. 2d 603, is in direct conflict with the order of the Fifth Circuit in the case at bar in denying petitioner's petition for rehearing without opinion (Appendix B., Appendix C.).

In support of this it is respectfully urged that in said petition for rehearing it was pointed out to the Fifth Circuit Court of Appeals that the court had in its opinion reversed the trial court because of the fact that three of the appellants, namely, Schiff, Roberts and Gibbons were not employed by the organization in question at the time of the commission of the substantive offenses and for that reason and for that reason alone the Fifth Circuit Court of Appeals set aside the sentences against the defendants Schiff on counts one, three, four, five, six and seven; against Gibbons, counts one, two, three, four, five, seven, eight and nine, and against Roberts on counts one, two, four, five, seven and nine. However, they allowed the conspiracy count to remain.

As to your petitioner Levine, they allowed all of the counts to stand although the evidence is clear that your petitioner George Levine did not join the organization

in question until July 22, 1960, as is set forth in the indictment herein and that seven of the substantive counts were allegedly committed prior to that date.

That it is apparent to your petitioner that the law applied with reference to said counts as described herein by the Fifth Circuit Court of Appeals was proper for the appellants Gibbons, Roberts and Schiff, but not for the appellant George Levine. Your petitioner is at a loss to see how the law can be applied to one and not equally to another. That the failure to apply the law as to him as was applied to the other defendants, Gibbons, Schiff and Roberts would be a denial of his rights under the Constitution of the United States.

It is further respectfully submitted that the Fifth Circuit erred in its opinion (Appendix A.) in deciding the points more fully raised in your petitioner's brief attached hereto and made a part of the petition for writ of certiorari as Appendix D.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the opinion herein and in the order denying the petition for rehearing herein without opinion, and that the writ herein sought should be issued and the decision of the Fifth Circuit of the United States Court of Appeals be reversed.

Respectfully submitted,

NICHOLAS J. CAPUANO of
LURIE & CAPUANO
1409 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioner

By .....

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing was this ..... day of May, 1965, mailed to the SOLICITOR GENERAL, Department of Justice, Washington, D. C.

NICHOLAS J. CAPUANO

APPENDIX A.

IN THE

United States Court of Appeals

FOR THE FIFTH COURT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 11, 1965.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

TUTTLE, Chief Judge: This is an appeal by ten co-defendants from their convictions in a jury trial for violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C.A. Sec. 17 (q) (a), and the Mail Fraud

Statute, 18 U.S.C.A. Section 1341, and conspiring to violate those laws, 18 U.S.C.A. Section 371. The indictment charged a scheme under which the defendants sold to the public notes of Credit Finance Corporation, which were to return 12%, and later 8%, interest. This interest was stated to be produced by C.F.C.'s income from automobile loans and real estate transactions. The alleged scheme was that, rather than carrying out the income generating plan represented to the investors, the principals behind C.F.C. were to, and did, divert investors' funds to themselves for their personal use.

Of the ten defendants, Norman Gradsky, Robert Grene, and Leonard Glaser, do not challenge the sufficiency of the evidence against them. We conclude that there is no substantial issue as to whether there was sufficient evidence to sustain a verdict of guilt as to Mrs. B. J. Gradsky, the wife of Norman Gradsky, and George Levine, who took control of the company in July, 1960. There remain questions as to the sufficiency of the evidence to warrant submission of the cases of the other five defendants to the jury and a number of alleged errors in rulings by the trial court which will be deal with below.

Gertrude Hogue has abandoned all contentions on this appeal except that there was not sufficient evidence to tie her in to the scheme or the false representations to warrant the trial court's submission of her case to the jury. She makes an appealing case because, although she was named as a vice president, it is apparent that she profited from the operation only to the extent of receiving a modest salary with a small bonus. However, we are compelled to conclude that such appeal as she could make on these grounds were properly addressed to

the jury, and may still be addressed to the trial court in a motion to reduce sentence under Rule 35, F.R.Cr.P. We conclude that it can not prevail here in light of the clear evidence in the record that would warrant a jury's finding that Mrs. Hogue herself sold notes of the fraudulent company and in so doing repeatedly misrepresented the nature and financial condition of the organization. There is evidence from which the jury could determine that she knew her representations were false and that in submitting for inspection copies of the company's' financial statement, she was lending her aid to the fraud.

Appellants Gibbons, Schiff, Roberts and Meadors were all salesmen for C.F.C., and all made misrepresentations about the nature and financial condition of the company to investors. The question of sufficiency of the evidence as to these parties turns on their knowledge that their statements were untrue. Gibbons worked for the company for only two months. However, during that time he was its treasurer and served as an auditor. Schiff was in C.F.C.'s employ longer than Gibbons. Among his false statements to investors was the statement that C.F.C. was insured under federal and state laws. Roberts was a vice president of C.F.C.; he too represented that C.F.C.'s interest rate was insured. Meadors was also a C.F.C. vice president and was manager of its Orlando office; he also misrepresented the nature of the Florida regulation of C.F.C. and he falsely told an investor that he had his own money in the company. While it was not shown that any of these four persons diverted any of the company's money to their own use, other than the compensation they drew as salesmen, the jury was authorized to find that when they represented the facts concerning the company's position which turned out to be false,

their relationship with the company was such that they actually knew of the falsity of the misrepresentations. *Peel v. U.S.*, 5 Cir., 316 F. 2nd 907.

The Court concludes, therefore, that there was sufficient evidence as to each of the appellants to permit the jury to determine whether they were guilty of some of the offenses as charged beyond a reasonable doubt.

Most of the appellants make their strongest claim of error here on language in the charge of the trial court, which they say amounted to comment by the trial court on the defendants' failure to take the witness stand. The challenged instruction, to which no objection was made on the trial, follows:

> "Now then it is my duty to tell you that the indictment that I mentioned in the case there is no evidence whatever . . . It has no probative force. When I say probative force I mean proof.
>
> "The only testimony you will consider will be the testimony from the lips of witnesses given under the supervision of the Court or by documentary proof and no other.
>
> "The indictment is a mere formal charge. The Grand Jury heard only one side. The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . They should be put up on their trial . . . and unless they answered they should be convicted.
>
> "And so that is not testimony as having any probative force whatsoever."

Appellants rely on *Perez v. United States*, 5 Cir., 1961, 297 F. 2nd. 12, in support of their contention that this charge amounted to prejudicial error. The *Perez* case is not apposite here. There, the government relied upon the presumption statute, 21 U.S.C.A. Sec. 176 (a),[1] which in effect provided a statutory presumption of guilt of possession of marijuana absent an explanation by the defendant. In that case the trial court had properly charged the jury on the burden of proof and the presumption of innocence, but the jury returned to the courtroom and requested that the relevant parts of the Code be read to it. The court read the section referred to above, whereupon *both government counsel and defense counsel* requested that the court add that such explanation could come through other witnesses and that the defendants were not themselves required to take the stand. The judge refused to charge in that respect, and we reversed on the ground that this was prejudicial error.

The situation is quite different here. In the first place, the reference to what the Grand Jury thought is really innocuous; it was part of the judge's effort to tell the jury that the fact that the Grand Jury had made the charge and thought that the defendants were guilty unless they came up with some answer to the charge, was really not to be considered by the jury as having any probative force whatever. In point of fact the defendants did make an answer to the indictment when they entered their pleas of not guilty. There was nothing in the charge that indicated there was an obligation on the defendants

[1]This statute provides in part as follows: "Whenever on trial for a violation of this subsection, the defendant is shown to have had or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

to take the witness stand themselves. If there had been any such implication, it was completely answered by the subsequent charge of the Court expressly stating:

> "The law is such that a defendant . . . an accused person in the federal court is not required to take the witness stand. He doesn't have to do anything. So that the very fact that there is no testimony on the part of the defendants would not justify it in drawing any adverse inferences.
>
> "On the contrary, they were within their rights in not testifying in the case.
>
> "So you will give no consideration whatever to the fact that the defendants, or any of them, did not testify in the case."

In the *Perez* case we stated that when the trial court charged the presumption statute, it was incumbent on the trial court to reiterate or call again to the jurors a charge such as was actually given in this case. We conclude that there is no merit in the contention that the trial court or government counsel in any way prejudiced the defendants' rights by any reference to defendants' failure to testify on their own behalf.

The second important criticism that is made of the trial court's conduct of the trial devolves upon the absence from the courtroom during the trial of records of a company called Security Guaranty Corporation, the corporation to which Mrs. B. J. Gradsky transferred all the stock of C.F.C. in April, 1960. It is plain that these records were available in the government's possession in Orlando, the place of the trial, for most of the period of the trial, but they were later taken elsewhere by a

postal inspector for proper use by the United States. It is not clear from the record presented to us whether counsel for any of the defendants specifically moved for the production of these records and that such motion was pressed to a conclusion before the trial court.[2]

In any event, it is not shown that the absence of these records in any way prejudiced the appellants. The government expert, the accountant Callahan, whose summaries and charts of C.F.C.'s finances were among the government's most telling evidence, stated that he did not rely on records of S.G.C. in making his summaries. It is not disputed that the records of C.F.C. were in court and available to the appellants for inspection and for purposes of cross-examination. We think under the circumstances, the case of *United States v. Consolidated Laundries Corp.*, 2 Cir., 1961, 291 F. 2d. 563, does, therefore, not support the appellants' contention in this regard. The summaries were, of course, admissible. See *Greenhill v. United States*, 5 Cir., 298 F. 2d. 405, cert. denied, 371 U.S. 830, (1962).

A further charge of error relates to the refusal of the trial court to grant an extra peremptory challenge in light of the responses made by one juror, a Mrs. Lewis. Upon *voir dire*, this lady who had never before been a juror, indicated, in response to a question by counsel, that she thought both sides should come forward with evidence. However, when counsel called her attention to the fact that the defendants do not have to "say a single word in this case," Mrs. Lewis said, "Oh! I see." She was then asked by counsel, "You understand

[2]It is clear that the motion referred to by counsel in their brief did not contain a motion for production of these records. We have been unable to find any other.

that the burden is upon the government to establish their case?" And she answered, "Oh. Yes, I see what you mean." Responding to a question by counsel, "Then it is your view that both sides should come forward with evidence in this criminal case?" She answered, "Well, I thought that was the procedure. I never served." She further answered the question, "Do you have a firm conviction in your mind that my client, Mr. Meadors, should come forward with the evidence in this case if he is on trial?" She answered, "I think so." Thereupon the court interposed and stated, "She doesn't know about those things."

If these were proper questions by counsel to be asked on a *voir dire*, which we seriously doubt, all that was elicited from this prospective juror was that she did not know the rules of law as to which the trial court would later charge the jury. Counsel's effort to educate her as to the right to remain mute apparently had not quite succeeded at the time when counsel then made a motion for sustaining a peremptory challenge. There is no indication that Mrs. Lewis did not fully understand and follow the trial court's subsequent instruction when the time for instructing her on the law occurred.

We conclude that there no no merit in the contention that this juror's lack of knowledge as to the presumption of innocence and right not to testify before the trial started required the granting of additional peremptory challenges. Moreover, there appearing to be no evidence of conflicts of interest among the defendants, we can not hold that there was an abuse of discretion by the trial court in not exceeding the ten peremptory challenge rule of Rule 24(b) Federal Rules of Criminal Procedure.

Appellants argued that a proper foundation was not laid for the admission of C.F.C.'s books under the Federal Shop Book Rule, 28 U.S.C.A. Sec 1732. While authentication of each entry and identification of the persons making them was not presented, there was testimony by various employees of the corporation that the entries and records in question were made in the ordinary course of C.F.C. business. The requirements of this statute which was designed to facilitate proof of business records seem to have been fully met here. The criticisms were such as could be argued as to the weight of the evidence rather than to its admissibility. See *Carroll v. United States*, 9 Cir., 1963 326 F. 2d 72, and *Taylor v. United States*, 5 Cir., 96 F. 2d 16.

This case required five weeks to try. As indicated, there were ten defendants. There were ten counts to the indictment. It is inevitable in such a situation that each of the defendants, when he has been convicted by the jury, seeks, on appeal, to work a reversal on the theory that a particular bit of evidence introduced on the trial, directly implicating another defendant, made no mention of the one now complaining. Typical of this is the contention made by so many of the appellants that they ought not to be bound by the falsity of the books since they had nothing to do with keeping the books. Appellant Roberts, for instance, says, "Yet the evidence was undisputed that Roberts made no entries therein or had any connection or knowledge thereof. The law is well established that such books and records are admissible only against corporate offices with access and control thereof, who dominated and controlled the company, or if they made or supervised the entries therein. Such books and records

do not constitute competent evidence against one merely because he is connected with a company."

Certainly it is the law that such books and records do not constitute competent evidence against one *merely because he is connected with the company*, but such was not the situation of Roberts. In the first place he was a vice president of the company; in the second place, he stated to victims that the funds loaned by the victims were "insured" and he told victims that the company owned a large shopping center, which was making lots of money; he also said the company's funds were invested in automobile paper and real estate, and "just about everything that you could lay money on." When a participant undertakes to persuade an investor to turn his money over to him, as Roberts did, and in order to make the deal makes false statements touching on the assets of the corporation, and is, thus, making a representation concerning what is shown by the books, the jury is free to draw the inference that he is as responsible for the books and records of the company as if he had made the entries therein.

This illustration is merely one of many contentions made by appellants here in which a complete misconception of the responsibility which an individual has towards the entire operation once he is found by the jury to be a participant in the scheme.

We have carefully considered each of the assignments of error, consisting largely of alleged errors in the giving or refusing to give proper elements of the charge and the admission of evidence against individual defendants and find that most of them are based upon this lack of appreciation of the degree to which a jury may infer par-

ticipation on the scheme, participation in the conspiracy, and responsibility for the acts of joint conspirators. We conclude that the appellants had a fair trial. They were represented by able counsel. The fact that the scheme and conspiracy, found by the jury to have been set up to prey on the investing public was a complex and involved one, can not be permitted of itself to frustrate a trial where any slight errors or inconsistencies that may creep in are, as we find them to be here, without prejudice to the accused persons. See *Greenhill v. United States*, 5 Cir., 298 F. 2d 405.

We have stated above that there was ample evidence to submit to the jury the question of guilt of the appellants Gibbons, Schiff, Roberts and Meadors as to some of the charges. We have, however, carefully read the testimony with respect to these defendants and conclude that as to each of them whose appeals are still pending here, Gibbons, Schiff and Roberts,[3] their tenure with the company and thus their involvement in the fraudulent scheme was so short in point of time and the number of representations actually by them made were so restricted that we conclude since, too, they had no proprietary interest in these businesses, there was not sufficient evidence to warrant the jury's finding guilt beyond a reasonable doubt as to those counts which charged them with having participated in substantive crimes at a time when they were not actually employed by C.F.C.

The record is clear that Schiff was an employee of C.F.C. no longer that from the latter part of July, 1960,

---

[3]Meadors' appeal was dismissed for want of prosecution. We think it not inappropriate, however, to suggest that the relief afforded to the other three short-time employees of C.F.C. may be considered by the trial court upon the presentation by Meadors of a proper motion to reduce sentence under Rule 35.

to the end of September of that year. We, therefore, conclude that his conviction of counts one, three, four, five, six and seven must be set aside. Roberts was a part-time employee of C.F.C. between August, 1959, and April, 1960. We conclude, therefore, that his conviction on counts one, two, four, five, seven and nine must be set side. Gibbons was an employee of the company for approximately two months—from the end of December, 1959, to the end of February, 1960. His conviction on counts one, two, three, four, five, seven, eight and nine are, therefore, vacated and set aside.

We fully recognize the principle asserted by this Court in *Sherwood v. United States*, 5 Cir., 300 F. 2d 603, that all who, with criminal intent, join themselves even slightly to the principal scheme, are subject to the statute. See *Kaplan v. United States*, 2 Cir., 18 F. 2d 939, but with respect to the substantive counts here charged there must be sufficient evidence of the intent of the separate defendants to participate in the scheme, and the acts done in furtherance thereof, to warrant submission of the separate charges to the jury.

Here, we find insufficient evidence to warrant the submission of the charges against the three named appellants which we have now determined should be vacated.

The judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons. The judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten. The sentences against Roberts on counts one, two, four, five, seven and nine are set aside.

The judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten.

The sentences against Schiff on counts one, three, four, five, six and seven are set aside.

The judgment against Gibbons is affirmed as to the sentences on counts six and ten. The sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside.

The case is remanded for further proceeding not inconsistent with this opinion and judgment.

APPENDIX B.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

APRIL 9, 1965

Re:
No. 19974
NORMAN GRADSKY, ET AL
Versus
UNITED STATES OF AMERICA

Gentlemen:

You are hereby advised that the court has today entered an order denying the petitions for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

Mr. A. Allen Saunders
Attorney at Law
New York 19, New York
Messrs. Thomas F. Call
and Hugh W. Darling
Attorneys at Law
Los Angeles 14, Calif.
Mr. Sam E. Murrell, Jr.
Attorney at Law
Orlando, Fla.
Mr. Max Lurie
Attorney at Law
Miami 32, Fla.
Mr. Larry J. Hoffman
Attorney at Law
Miami, Fla.

Mr. E. David Rosen
Attorney at Law
Miami 32, Fla.
Mr. Fuller Warren
Attorney at Law
Miami, Fla.
Mr. Verne L. Freeland
Attorney at Law
Miami, Fla.
Mr. Arnold D. Levine
Assistant U. S. Attorney
Tampa 1, Fla.
Mr. Mahlon M. Frankhauser
Assistant Director
Securities & Exchange Comm.
Washington, D. C.

COURT RULE

Rule 32

ISSUANCE OF MANDATE

Date of Issuance: The mandate of the court shall issue after twenty-one (21) days from the date of decision unless the time is shortened or enlarged by order. A certified copy of the judgment, and a copy of the opinion of the court, if any, where a new trial or further proceedings are to be had in the lower court, shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. Unless otherwise ordered, if the petition is denied, the mandate shall issue after seven (7) days from entry of the order denying the petition.

A mandate once issued will not be recalled except by the court and to prevent injustice.

Adopted May 31st, 1963.

APPENDIX C.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

on behalf of

Appellant, GEORGE LEVINE

MAX LURIE
1409 Biscayne Building
19 W. Flagler Street
Miami, Florida
Attorney for Appellant

PETITION FOR REHEARING

The Appellant, George Levine, respectfully petitions this Court for rehearing of the appeal herein on the following grounds:

The Appellant respectfully suggests that the United States Court of Appeals, Fifth Circuit, erred in its judgment in that it failed to consider several aspects of the Appellant's brief in support of Points I, II, IV and VI.

Points I and II of this Appellant's brief are concerned with the Voir Dire examination of the Juror, Mrs. Lewis, and the abuse of discretion of the Lower Court in not granting additional peremptory challenges. There is no question but that Mrs. Lewis specifically stated on Voir Dire examination that she would have to hear both sides, that she would expect the defendants to come forward with evidence. This Court passes this statement of the juror off by saying in its opinion that she did not know the rules of law as to which the trial court would later charge the jury. Surely this Court has enough experience to know that people who have such ideas in their minds cannot have them erased by an instruction of the court as to the law. This Honorable Court has at times made such statements in their opinions. That instructions cannot wipe out certain things and impressions.

The Court further went on to say in its opinion that there is no indication that Mrs. Lewis did not fully understand and follow the trial court's subsequent instruction when the time for instructing her on the law occurred. Certainly there is no indication here that she did understand fully the trial court's subsequent instructions at the close of all the evidence. In fact this Court in finding that

there was not sufficient evidence to convict three of the defendants on various substantive counts exhibits a lack of understanding of the law by all of the jurors including Mrs. Lewis. Surely the fact that Mrs. Lewis was of the mind that she would have to be convinced by hearing both sides, even if the court felt that the failure to grant more peremptory challenges was not an abuse of discretion, it was certainly a proper ground for a challenge for cause, which was made and denied.

Appellant further argues that Rule 24 (b). of the Federal Rules of Criminal Procedure giving the Court the right to grant more than ten peremptory challenges was promulgated for cases just as the one before this Court. There were ten defendants, ten counts. The atmosphere of the community was charged against these defendants, by news media of all kinds, as was shown by the length of time it took to get a jury, and from the number of challenges for cause that were sustained by the Court. Appellant urges that the trial court did abuse discretion by not granting more peremptory challenges.

As to Point III wherein the trial court in its charge to the jury stated,

> "The Grand Jury returned an indictment, and the Grand Jury of course, its thought was unless there was an answer to it. They should be put on their trial, and unless they answered they should be convicted."

This Court in its opinion passed over this abominable statement by the Court very lightly. Just because the trial court tried to cure its prejudical statement by saying it had no probative force and by other instruction does not excuse the giving of such a charge. How can this Court

say that such a statement was innocuous? Appellant feels that this Court is only making excuses for the trial court in its opinion. That this error is so serious that it would and should be a basis for reversing the whole case, which this Court was not inclined to do. This Court said in its opinion that the defendants did answer the indictment by pleading not guilty. Then why should the trial court who knew that the defendants had entered a plea of not guilty, go on to say:

"Unless there was an answer to it, they should be put on their trial, and unless they answered they should be convicted."

Certainly that charge, especially to a juror of the mental attitude of Mrs. Lewis, implied an obligation on the part of the defendants to take the witness stand and present evidence. The later subsequent charge attempting to correct such implication could not and would not erase such a statement from the minds of the jurors.

Suppose that the prosecuting attorney in his summation stated to the jury:

"That unless the defendants answered the indictment they should be convicted." Would this Court then say that such a statement or implication would be cured by the trial court charging the jury that the defendants need not take the stand and no inference could be drawn from the fact that they did not take the stand. I am sure that this Court would reverse upon the ground that the prosecutor cannot comment on the failure of the defendants to take the stand. That it would be a violation of their constitutional rights. Is it less a violation of their constitutional rights if the trial court makes such a statement? It is the Appellant's

view that the trial court cannot cure such a statement by a subsequent charge no more than he could cure such a statement by a prosecuting attorney by subsequent charges. It is the Appellant's view that the constitutional rights of all of the defendants were violated by the Court's charge as set forth in Point III of Appellant's brief.

As to Point VI, the Appellant is at a loss to understand the position of this Court. This Court in its opinion on page 12 stated:

> "We have carefully read the testimony with respect to these defendants and conclude that as to each of them whose appeals are still pending here, Gibbons, Schiff and Roberts, their tenure with the company and thus their involvment in the fraudulent scheme was so short in the point of time and the number of representations actually made by them were so restricted that we conclude, since, too, they had no proprietory interest in the businesses, there was not sufficient evidence to warrant the jury's finding guilt beyond a reasonable doubt as to those counts which charged them with having participated in substantive crimes at a time when they were not actually employed by C.F.C."

Surely, this Court does not want to go on record to say that law as to one defendant is not law as to another. This Appellant, George Levine, by the government's own indictment, came into this organization on July 22, 1960, when he purchased the Security Guaranty Company. But not a single bit of evidence was introduced to show any connection between Levine and the Security Guarantee Company.

Seven of the substantive counts alleging a criminal offense were committed prior to July 22, 1960. The company ceased doing business on October 31, 1960, according to the government's witness, Callihan. In analysing this Court's opinion, Appellant points out that:

1. Defendant Schiff was employed by C. F. C. from the latter part of July 1960 to the end of September 1960. Just one month shorter than the defendant, Levine, yet all substantive counts occurring prior to his employment are set aside, regardless of the fact that he made representations to, as the Court says, victims and is guilty of conspiracy with all of the defendants.

2. Defendant Roberts was a part time employee of C.F.C. between August 1959 to April 1960, approximately nine months, he was also a Vice-President of the company. He was in the organization six months longer than Appellant, George Levine, and made representations to so called victims. Yet his conviction was set aside as to substantive counts occurring when he was not employed. His conviction as to conspiracy with all the others stands.

3. Gibbons was employed for three months, was a treasurer of the company, made representations and his conviction of conspiracy with the others was not disturbed.

Appellant fails to see how his position would be different from the other three defendants. Seven of the substantive offenses, as alleged, were committed prior to his having any connection with the organization. He made no representations to so called victims on those substantive counts, he had nothing to do with the mailings and he had nothing to do with the policy of the company and was by the gov-

ernment's own evidence a party to the organization from July 22, 1960, to October 31, 1960.

This Court wrote in its opinion on page 13 the following:

> "but with respect to the substantive counts there must be sufficient evidence of the intent of the separate defendants to participate in the scheme, and acts done in furtherance, to warrant submission of the separate charges to the jury."

How can this court in its sound judgment say that Appellant, George Levine, had the specific intent to participate in the substantive offenses committed prior to July 22, 1960. How can this Court say that he, George Levine, had the intent to participate in the scheme when at the time the offenses were committed he had no knowledge of the scheme. How can this Court say that he, George Levine, had the intent to participate in the acts done in furtherance of the scheme when he had no knowledge of them. This Court by its opinion is saying that Appellant, George Levine, by joining this organization on July 22, 1960, had the specific intent necessary for the commission of all of the substantive crimes committed prior to that date even though he could not possibly have any knowledge of the commission of such substantive offsences.

That, in this Court's opinion was the law as to Roberts, Gibbons, and Schiff, but was not as to Appellant, George Levine. Why? The Court intimates that it is because Levine had a proprietory interest. I am sure that this Court does not intend to say that if a person purchases an interest in an organization which is later charged with fraud, that in so doing, said person should be held crim-

inally liable for any substantive offense requiring a criminal intent, which is knowingly and wilfully committed by employees or principals of the organization prior to his purchasing an interest.

Appellant contends that this is not the law, and therefore the conviction of Appellant, George Levine, on all substantive counts committed prior to July 22, 1960, should be set aside.

WHEREFORE, the Appellant, George Levine, respectfully requests this Court to grant the Appellant's Petition for Rehearing in this cause.

Respectfully Submitted,

MAX LURIE
Attorney for Appellant
1409 Biscayne Building
19 West Flagler Street
Miami, Florida

STATE OF FLORIDA)
COUNTY OF DADE) ss.

MAX LURIE, being first duly sworn, deposes and says: That he is of counsel for the Appellant in the above entitled cause and that he has this 23rd. day of March, 1965, mailed a true copy of the foregoing Petition for Rehearing to the following: EDWARD F. BOARDMAN, United States Attorney for Appellee, Federal Building, Jacksonville, Florida, and he further states that this petition is presented in good faith and not for the purpose of delay.

MAX LURIE

Sworn to and subscribed
before me this 23rd day
of March, 1965.

s/ Gladys Hickey
Notary Public, State of Florida

My Commission expires:

Notary Public, State of Florida at Large
My Commission Expires June 11, 1965
Bonded by American Surety Co. of N.Y.

(SEAL)

APPENDIX D.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of Florida

---

OPENING BRIEF OF APPELLANT, GEORGE LEVINE.

MAX LURIE, ESQUIRE
1409 Biscayne Building
Miami, Florida 33130
Attorney for Appellant,
GEORGE LEVINE.

TOPICAL INDEX TO BRIEF

Page

Introduction .....

Statement of the Case and Facts .....

Specifications of Error .....

Argument

Point I .....

Point II .....

Point III .....

Point IV .....

Point V .....

Point VI .....

Point VII .....

Conclusion .....

Certificate of Service .....

INDEX TO CITATIONS

Case	*Page*
Baker v. Hudspeth 129 F.2d 779 (C.A. Kan. 1942)	17
Beck v. United States 298 F.2d 622 (9th Cir. 1962)	23
Berger v. United States 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)	34
DeLuna v. United States 308 F.2d 140 (5th Cir. 1962)	23, 39, 40
Greenbaum v. United States 80 F.2d 113, 120 (9th C.C.A. 1935)	43
Greenhill v. United States 298 F.2d 405 (5th Cir. 1962)	37, 44
Jordan v. United States 295 F.2d 355 (10th Cir. 1962)	19
Lloyd v. United States 226 F.2d 9 (1955)	44
Napue v. People of the State of Illinois 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217	37
Perez v. United States 297 F.2d 12, 16 (5th Cir.)	40
Redfield v. United States 315 F.2d 76 (9th Cir. 1963)	23

Case	*Page*
Reynolds v. United States 98 U.S. 145	23
United States v. Consolidated Laundries Corporation 291 F.2d 563 (2nd Cir. 1961)	35
United States v. Fujimoto 107 F.Supp. 865 (D.C. Hawaii 1952)	26
United States v. Milanovitch 303 F.2d 626, 629 (4th Cir. 1962)	18
United States v. Zborowski 271 F.2d 661, 668 (2nd Cir. 1959)	35
Wagner v. United States 263 F.2d 877 (5th Cir. 1959)	34

AUTHORITIES

Amendment V, United States Constitution	39
Amendment VI, United States Constitution	17
15 U.S.C. 77q(a)	1
18 U.S.C. 371	1
18 U.S.C. 1341	1
18 U.S.C. 3481	39
Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A.	18, 25, 26
8 Wigmore, Evidence § 2224 (McNaughton's rev. 1961)	37
Lord Coke on Littleton, 155(b)	22
Lord Coke on Littleton, 156(b)	22

INTRODUCTION

The parties will be referred to in the position they occupied in the trial court. Inasmuch as defendant George Levine and the Assistant United States Attorney, Arnold Levine, have the same surname, defendant George Levine will be referred to as "defendant Levine" and Arnold Levine will be referred to as "the Prosecutor". Reference to the record-on-appeal will be by the use of the symbol "R".

STATEMENT OF THE CASE AND FACTS

Defendant George Levine was accused jointly with ten other co-defendants of violating the anti-fraud provisions of the Securities Act of 1933, committing acts of mail fraud and conspiracy. Specifically, the indictment contained five counts setting forth violations of 15 U.S.C. 77q(a), fraud in the sale of corporate securities, four counts setting forth violations of 18 U.S.C. 1341, mail fraud and one count of conspiracy to violate the corporate security and mail fraud laws in violation of 18 U.S.C. 371.

In seven counts, the alleged substantive acts occurred prior to the time defendant Levine was alleged to have joined the other defendants. All of the counts involved the use of the mails. The only overt act alleged in the conspiracy count as to defendant Levine was that on August 15, 1960, Levine induced Stella Grace Johnston to renew a $10,000.00 note and to increase her investment to $12,000.00 When Stella Grace Johnston was placed on the witness stand she at no time identified the defendant George Levine.

After trial on the above charges, the Defendant Levine was convicted of ten counts as were all other defendants.

Defendant Levine's motion for new trial was denied and he was sentenced for a period of fifteen months on each count with the sentences to run consecutively or a total sentence of twelve and one-half years.

Quite simply, the facts are that Credit Finance Corporations, a Florida corporation, was incorporated on November 19, 1958 (Gov't. Ex. 2). The corporation's activities were confined to lending money to automobile purchasers and to purchasing real property for the development of subdivisions and commercial properties (R. 4293, 4294).

Defendant Norman Gradsky contributed $78,127.90 as capital and surplus to commence the corporate business (R. 3504).

Credit Finance Corporation on April 3, 1959, started to sell corporate notes to the public which paid 12 per cent interest and later 8 per cent interest (R. 1388, 1389, 1841).

Credit Finance Corporation's stock was purchased on or about April 1, 1960 by Security Guaranty Company (R. 3630-3638).

Security Guaranty Company on or about July 22, 1960, relinquished control of Credit Finance Corporation or the management of Credit Finance Corporation was changed (R. 3637). The name *Security Guaranty Company* and the date *July* 22, 1960 has important significance to defendant Levine because the Government attempts to prove its case against Levine beginning on July 22, 1960.

Yet, not a single record, book or paper of Security Guaranty was produced in evidence. The Government, during

the course of the trial had taken the records, books and papers of Security Guaranty Company and placed them in the trunk of a car of a United States postal inspector and then directed the inspector to drive with the records across the State of Florida (R. 3634, 3783, 3785-3787, 3901, 3993).

The deliberate and/or negligent suppression of the records of the Security Guaranty Company by the Government will be treated at great length in one of the Points on this appeal.

The testimony is replete with statements that interest payments were promptly received. There is also testimony that the Chamber of Commerce and Better Business Bureau gave its stamp of approval to Credit Finance Corporation (R. 1866). In addition, an auditor from the office of the Comptroller of the State of Florida testified that in September 1960, he checked the conditional sales finance contracts issued by Credit Finance Corporation and that the finance company was given a clean bill of health (R. 2560, 2573).

Nevertheless due to fortuitous business conditions, Credit Finance Corporation, which was controlled by Security Guaranty, failed and as a result many people who had invested their money to garner more than the usual rate of interest, suffered financial losses.

It was only after the financial losses that complaints were made to the authorities and the Government charged the defendants with employing a scheme to defraud and obtain money by false representations.

By the time the trial had started, newspapers, tele-

vision and radio publicity had saturated the community with details of the alleged crimes. The respective counsel for the ten defendants were compelled to seek additional peremptory challenges in order to obtain a fair and impartial jury (R. 67-71). The Court refused to grant a single additional challenge (R. 67-71). The Prejudice which resulted to the defendants because of the denial of addition peremptory challenges will be found in Points I and II of this brief.

The Government's two chief witnesses were Mrs. Hightower, a former employee of Credit Finance Corporation and Security Guaranty Company, who was never indicted by the Government, and George M. Callahan, a Security and Exchange Commission accountant.

Mrs. Hightower prior to trial had given her statement to an agent of the Securities Exchange Commission. During the cross-examination of Mrs. Hightower she admitted that the statement prepared by the Government was not accurate (R. 1458). She advised the agent for the S.E.C. that the statement they had drafted of her report to them was not true (R. 1460, 1465). When it appeared that the Government had several different statements of Mrs. Hightower which they had not produced when requested by defendants under the authority of the so-called Jenks Act, a motion for mistrial was made and denied (R. 1483, 1484). Mrs. Hightower testified that fifty per cent of the statement that was produced was misreported (R. 1492).

George M. Callahan, the accountant for the Securities and Exchange Commission, testified for a period of four days (R. 3435-4014). He stated that he made an audit of Credit Finance Company from December, 1958 until

October 31, 1960 (R. 3436). He prepared a balance sheet of Credit Finance Corporation dated July 22, 1960 (R. 3485). In addition, Mr. Callahan prepared what he termed a cash flow statement for Norman Gradsky, B. J. Gradsky and related corporations (R. 3500). During his examination he admitted that he would treat a sale by Credit Finance for purposes of this investigation as a loss whereas the same type of sale would be treated as reflecting an asset if he were investigating Credit Finance for income tax purposes (R. 3540). Mr. Callahan repeatedly testified that he had omitted to credit certain items in the two charts he prepared, which items would have enhanced the assets of the Credit Finance Corporation (R. 3567, 3580, 3610, 3650). He further admitted that he left out items on the balance sheet without even checking to determine the value of the items which he deleted on the balance sheet (R. 3651, 3655, 3657, 3732, 3737, 3742, 3749). He further admitted that he didn't even try to find among the papers of Security Guaranty Company an agreement and amendment between Security Guaranty, Credit Finance and a Mining Royalty Company, which involved a transfer of properties from Credit Finance Corporation and Security Guaranty Company to Mining Royalty Company in exchange for 519,000 shares of the latter's stock (R. 3895-3905).

Mr. Callahan testified that the figures on the balance sheet reflecting the financial condition of Credit Finance Corporation on July 22, 1960, were based upon events taking place as late as May, 1962 (R. 3958, 3966).

Prior to Mr. Callahan taking the witness stand, a motion to produce was filed with the Court in order that the records of Security Guaranty would be available to the

defendants (R. 3411, 3412). The Court denied the motion (R. 3412).

Attorney, David C. Clarke, who made the motion to produce on behalf of all the defendants, was appointed by the Court to represent defendant Grene (R. 4052). Mr. Clarke testified that on the day of his court appointment, he requested to see certain records of the Security Guaranty Company, and that he went to a room where the Government was holding the Security Guaranty records (R. 4052, 4053). He further testified that he saw an original agreement and amendment to agreement between Security Guaranty, Credit Finance and Mining Royalty Company (R. 4054, 4055). Mr. Clarke then stated that while he was looking at these documents, a Government agent asked him to leave the premises as he would be supplied with copies of the documents he needed (R. 4055).

The Government did not supply him with the copies as promised and the Government, through its agents, told him the documents were taken either to Daytona Beach or Jacksonville (R. 4055, 4056).

Referring now to the closing argument of the prosecutor, he stated that attorney Rosen told the jury that Mr. Clarke filed a motion to produce the records of Security Guaranty (R. 4269). Mr. Rosen interrupted to state that there was a denial of the motion to produce (R. 4269). The trial judge interjected that "there is no such motion in the record." (R. 4269). The Court further stated that attorney Rosen was misinformed (R. 4269). The trial judge continued with his beratement of attorney Rosen by stating "there was never such motion presented to me. Never such motion. Nothwithstanding your statement." (R. 4270). The prosecutor then accused attorney Rosen

of questioning the integrity of the agents for the Security and Exchange Commission, the prosecutor's integrity, and the Court's integrity (R. 4270). Defendants' motion for mistrial was denied (R. 4277, 4278, 4281).

Adverting to the instructions to the jury, the trial judge charged:

> "The Grand Jury returned an indictment and the Grand Jury, of course, its thought was unless there was an answer to it . . . they should be put up on trial . . . and unless they answer they should be convicted." (R. 4299).

The trial judge further instructed the jury that the Security and Exchange Commission has enacted a statute that provided that any Securities that may be transported in interstate commerce from one state to another where there is a scheme or artifice to defraud and misrepresent the security in the transportation, the law is violated (R. 4291, 4292). The Court in this vein further charged the jury that "there was very little testimony about transporting from one state to another." (R. 4296). Exception was taken to the Court's charge relating to interstate transportation of securities in that none of the counts in the indictment involved such an issue (R. 4342).

These prejudical charges as well as others will be discussed in the Points, infra.

NO IDENTIFICATION OF DEFENDANT LEVINE

Defendant Levine was identified by Mrs. Hightower as having something to do with Security Guaranty Company since the latter part of July, 1960. Seven of the counts concerned periods of time prior to July, 1960.

Defendant Levine was required to sit through a trial that lasted from June 11, 1962, until July 19, 1962. Witness Robert M. Palmer an attorney and a Government witness testified that George Levine asked him to come to Orlando to check over the records of a finance company which he was interested in purchasing (R. 951-953). Mr. Palmer was hired by defendant Levine in order to determine that the finance business, which he was interested in acquiring, was in good order and that the operation was legitimate (R. 965).

There then followed an endless parade of witnesses and the typical answer of each witness in regard to defendant Levine is illustrated below.

Witness Cleora Patterson, a bookkeeper for Credit Finance Corp. stated that she neither saw defendant Levine nor heard his name in connection with any other companies. (R. 997, 998).

Witness Frieda Virack stated that she never saw George Levine (R. 1095).

Witness Jack Rothmeier stated that he did not know George Levine except what appeared in the newspapers (R. 1133, 1134).

Witness Alice Williams, who stated that she knew defendant Levine (R. 1183) was unable to identify Levine (R. 1184).

Witness Harley Steich stated that he doesn't know defendant George Levine (R. 1225).

Witness Frank Davie stated that he doesn't know defendant Levine (R. 1316).

Witness Milton Grawl, who is alleged as having received a letter through the mail in count one, doesn't know defendant Levine (R. 1377, 1378).

Witness John F. Kessel stated he never met defendant Levine (R. 1828).

Witness Walter Kryway, who is alleged in count three as having received a letter in the mail stated that he did not know defendant Levine (R. 1940).

Witness Jackie Stemper, who is alleged in count six as having received a letter in the mail stated that he did not know defendant Levine (R. 1978).

Witness Walter H. Verpualt, who is alleged in count seven as having received a letter in the mail stated that he did not know George Levine (R. 2164).

Witness Franklin Lyman, who is alleged in count four as having received a letter in the mail stated that he did not know George Levine (R. 2182).

Witness John A. Day who handled television contracts for the two finance companies, Credit Finance Company and Security Guaranty, stated that he never dealt with defendant Levine (R. 2286).

Witness John P. Hare stated that he never did any business with defendant Levine and that he never saw defendant Levine (R. 2358).

Witness Leroy Dustin testified that he did not know defendant Levine (R. 2378).

Witness Henry Rozmus testified that he met defendant Levine in August 1960, but then he identified another defendant as being defendant Levine (R. 2461, 2481).

Witness Ben D. McAndrew who had financed the purchasing of some airplanes by Credit Finance Company in 1959, (R. 2755) stated that he did not know the defendant Levine and that he never had any dealings with defendant Levine (R. 2780, 2827, 2829).

Witness Arthur Templeton also testified that he did not have any dealings with defendant Levine (R. 2854).

Witness James Payne testified as the others that he did not know defendant Levine (R. 2890).

Witness Carl Mullis testified that he did not know defendant Levine (R. 2904).

Witness Charles Choate testified that he had no dealings with defendant Levine (R. 2917).

Witness Robert Kohler testified that he neither had business dealings with defendant Levine (R. 2927, 2966), nor had he known defendant Levine (R. 2966).

Witness Stephen Beckman likewise testified that he had no business dealings with defendant Levine (R. 3013).

Witness Bonnie Stiegele testified that she had no dealings with defendant Levine (R. 3130).

Witness Billy E. Davis testified that he had no dealings with Levine and doesn't know Levine (R. 3149).

Witness Parker Capps, who sold some equipment to Credit Finance Company in August, 1959, stated that defendant Levine had nothing to do with the transaction (R. 3170).

Witness George Harrington stated that he did not know defendant Levine (R. 3210).

Witness Arthur F. Beyerle testified that defendant Levine had nothing to do with the lease entered into by the finance company (R. 3260).

Witness Robert D. Cunningham who sold a plane to Security Guaranty Company in July, 1960, testified that he did not know defendant Levine (R. 3355).

Notwithstanding all of the foregoing, defendant Levine was found guilty of the ten counts in the indictment, and he appeals from the judgment of guilt and sentence.

SPECIFICATONS OF ERROR

I.

The Court Erred in Overruling the Challenge for Cause Directed to Juror (Mrs.) Lewis Where Her Statement that the Defendants Must Come Forward With Evidence, Would Definitely Influence Her Verdict.

II.

The Court Erred in Denying Defendants Request for Additional Peremptory Challenges.

III.

(A) The Court Erred in Denying the Motion to Produce the Records of Security Guaranty Company.

(B) The Court Erred in Denying the Several Motions to Strike Testimony Relating to Security Guaranty Company.

(C) The Court Committed Fundamental Error in Allowing the Prosecutor to Suppress the Records of Security Guaranty Company Which Were Essential to a Proper Determination of the Cause.

(D) The Court Erred in Denying the Motion for Mistrial (R. 4277) Based Upon the Court's and Prosecutor's prejudicial Statements in Regard to the Records of Security Guaranty Company.

(E) The Court Erred in Denying the Motion for New Trial on the Grounds Relative to the Suppression of the Records of Security Guaranty Company.

IV.

The Court Erred in Instructing the Jury That the Defendants Must Answer the Indictment or be Convicted.

V.

The Court Erred in Admitting Charts of the Balance Sheet of Credit Finance Corporation and the Cash Flow Statement of the Gradskys Where Such Charts Were Based Upon Books and Records not in Evidence and Upon Personal Conclusions of a Government Employee.

VI.

The Court Erred in Denying the Motion for Judgment of Acquittal for Defendant Levine and in Denying the Motion to Strike as to Counts Three — Nine of the Indictment.

VII.

Omnibus Point

(Defendant Levine Relies Upon all Specifications of Error Raised by the Other Defendants and Their Argument Thereunder).

I.

The Court Erred in Overruling the Challenge for Cause Directed to Juror (Mrs.) Lewis Where Her Statement that the Defendants Must Come Forward with Evidence, Would Definitely Influence Her Verdict.

Amendment VI, of the Constitution of the United States of America guarantees that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury****" (Emphasis Added)

This amendment does not mean that a majority of the jury of twelve should be impartial and unbiased. A fair and impartial trial contemplates a trial before a jury of twelve impartial and unbiased men, neither more nor less. *Baker v. Hudspeth*, 129 F.2d 779 (C.A. Kan. 1942).

This particular trial was preceded by extensive newspaper, television and radio accounts concerning the alleged criminal acts of the defendants. Of course under such circumstances a duty devolves upon the trial court to make certain that the necessary conditions of a fair trial have not been impaired. Prospective jurors should be closely examined to determine whether they have been exposed to improper information and, if so, whether they can lay aside what they have read and heard in reaching a verdict. *United States v. Milanovitch*, 303 F.2d 626, 629 (4th Cir., 1962).

Defense attorneys, well aware of the difficulty in finding twelve impartial and unbiased jurors, requested additional challenges prior to the voir dire of the jury panel. Notwithstanding the fair and reasonable request for additional peremptory challenges because of the atmosphere surrounding the trial, the court refused to grant a single additional challenge (R. 67-71).

Rule 24(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., in contemplation of the very circumstances confronting the ten defendants and their respective counsel, provides that the court may allow additional peremptory challenges. The prejudicial effect of the trial judge's clear abuse of his judicial discretion in denying additional challenges is vividly seen by the following occurrences.

Prior to the voir dire examination of Mrs. Lewis, the ten dependants, because of the unfavorable publicity of the news media, were compelled to exercise their ten joint peremptory challenges to reject those jurors who demonstrated indications of bias. So when Mrs. Lewis was summoned, the defendants had exhausted all of their peremptory challenges. If a prospective, prejudiced juror is impaneled after all ten peremptory challenges are exhausted, the defendants are then free to complain that they were not tried by an impartial jury. *Jordan v. United States*, 295 F.2d 355 (10th Cir. 1962).

Juror, Mrs. Elizabeth J. Lewis, stated during the voir dire examination that she was a secretary at the Florida National Bank for over sixteen years (R. 587, 588). She was a secretary in the loan department to the vice-president of the bank (R. 596, 597). At this juncture, it would be a fair statement to say that her place of business was

in some categories of banking and financing a competitor of the defendants.

Mrs. Lewis after further examination testified as follows:

"Q. Now in connection with that will you hold the Government to the proof on that matter? Will you require that the Government prove beyond and to the exclusion of any reasonable doubt that Mr. Meadors knew about any scheme to defraud? Will you hold the Government to that proof? Will you hold the Government to that proof, ma'am?

"A. I wouldn't hold anybody to it. *I would listen to both sides* first *before I could make my mind up.* (Emphasis Added).

"Q. You understand . . . Let me get this clear. Now you understand that the defense doesn't have to say a word in this matter. Do you understand that? You understand that Mr. Meadors isn't obligated to say one single word in this case?

"A. Oh, I see.

"Q. You understand that the burden is upon the Government to establish their case.

"A. Oh, yes, I see what you mean.

"Q. Now let me ask you this question again. Will you hold the Government to that proof, and will you require the Government to prove their case against my client, Mr. Meadors, beyond and to the exclusion of any reasonable doubt? Will you require them

to prove and not require him to prove a thing?

"Q. *I think it should be both sides to prove it.* Maybe I don't understand your question. (Emphasis Added).

"Q. Let me ask you. Then it is your view that *both sides should come forward with evidence in this criminal case?* (Emphasis Added).

"A. Well I thought that was the procedure. I never served.

"Q. I don't know how I could make it any plainer, ma'am.

THE COURT: Those matters relate to the question of peremptories and not for cause.

"BY MR. STAHLEY:

"Q. Ma'am, let me ask you. Let me ask you one other question. I think I can bring this to cause. Do you have *a firm conviction* in your mind *that my client,* Mr. Meadors, *should come forward with evidence in this case if he is on trial?*

"A. I think so." (Emphasis Added).

The trial judge's comment concerning the prospective juror's attitude, which attitude would definitely influence her verdict when the defendants did not take the stand, was simply "She just doesn't know about those things." (R. 601) The Court then denied a motion to challenge the prospective juror for cause (R. 601). Defendants in a futile attempt to gain a fair and impartial jury moved,

once again, for additional peremptory challenges. The motion was denied (R. 604).

The trial judge aggravated his fundamentally prejudicial error when he instructed the jury:

> "The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was *unless there was an answer to it* . . . they should be put up on trial . . . *and unless they answered they should be convicted.*" (Emphasis Added) (R. 4299).

This instruction was exactly on point with Mrs. Lewis' firm belief that a defendant should come forward with evidence in a criminal trial. For she was asked whether she had a "firm conviction" in her mind that a defendant should come forward with evidence in a case where he is on trial. She stated "I think so." (R. 601).

As stated above, the accused is entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt., 155(b).

Lord Coke also says that a principal cause of challenge is

> "so called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers." Co. Litt. 156(b).

So it is with the juror Mrs. Lewis, because of her attitude and opinion that a defendant must come forward with evidence, that nothing is left to her conscience or discretion. It is obvious that she will enter a verdict of guilty

against a defendant who fails to take the stand. Mrs. Lewis' bias, prejudice or misconception of the law clearly reflects an attitude that would definitely influence her verdict.

Defendant Levine contends that Mrs. Lewis' statement that she has a firm conviction that the defense must come forward with evidence is such a manifestation of partiality as to leave nothing to her conscience or discretion as a trier of fact. Cf. *Reynolds v. United States*, 98 U.S. 145; *Beck. v. United States*, 298 F.2d 622, (9th Cir. 1962). As a juror she is incompetent when she places upon the defendants the burden of "removing" the evidence presented by the prosecution.

The trial judge by denying the challenge for cause to Mrs. Lewis placed the defendants in a position of having to waive their Constitutional privilege against self-incrimination as guaranteed by the Fifth Amendment of the Constitution of the United States or risk conviction as to juror, Lewis. Nowhere in our system of criminal jurisprudence is a defendant forced to take the witness stand because a juror demands a defendant to present his "side" of the case. See *Redfield v. United States of America*, 315 F.2d 76 (9th Cir. 1963); *DeLuna v. United States*, 308 F.2d 140, (5th Cir. 1962).

Mrs. Lewis' firm belief that a defendant must take the stand is tantamount to denying the accused the benefit of a presumption of innocence. When a juror's attitude is such that he cannot give the accused the benefit of the presumption of innocence, he is incompetent to serve in a criminal case.

It is astounding that a trial judge in a criminal case, where there is no requirement for a defendant to take the

stand, permitted a juror to be impaneled who would vote for a guilty verdict unless the defendant answered the prosecutor's evidence. The trial court's action, at the conclusion of the prosecutor's case and after the defense had offered no evidence, in charging the jury that the defendants should be convicted unless they *answered* the indictment against them, further astounded the writer of this brief whose only acquaintance with the trial is limited to the "cold" record (R. 4299).

The trial judge paid no heed to the requirement of the Sixth Amendment that the jury be an *"impartial jury"*. Therefore, this Court in preserving our basic and fundamental right to trial by an impartial jury should reverse the trial court under Point I. It is also to be pointed out that the abundance of evidence or the lack of evidence proving guilt has no effect upon prejudical error committed in the selection of a biased jury.

II.

The Court Erred in Denying Defendants Request For Addition Peremptory Challenges

Defendant Levine adopts by reference all of the argument under Point I. Defendant Levine was entitled to be tried by an unprejudiced and legally qualified jury. He was confronted with overcoming the biased and prejudiced opinions of the people of the community in which he was being tried because of extensive derogatory publicity. Proceeding properly, defendant Levine along with the other defendants requested additional peremptory challenges prior to the voir dire of the jury panel (R. 67-71). The request was denied. Rule 24(b) of the Federal Rules of

Criminal Procedure, 18 U.S.C.A., provides "If there is more than one defendant, the Court may allow the defendants additional peremptory challenges***." The trial judge clearly abused his judicial discretion and violated the clear intent of the Rule when he denied the request. During the voir dire examination almost every prospective juror stated that he knew about the case and about the "12 per centers". Others associated the case with a convicted murderer of a state trial judge, which murderer had a business that coincidentally paid "12 per cent" on borrowed money.

The prejudicial error of the trial court was clearly manifested when defendants were compelled to exhaust all ten peremptory challenges to reject biased jurors and then had no peremptory challenges left to reject Mrs. Lewis. Defendant Levine and the other defendants at this time afforded the trial judge a second opportunity to conduct a fair trial by repeating their request for additional peremptory challenges. The trial judge clearly abused his judicial discretion by refusing the second request for additional challenges (R. 604).

The purpose of granting additional peremptory challenges is to assist in the selection of a fair and impartial jury. *United States of America v. Fujimoto*, 107 F.Supp. 865 (D.C. Hawaii 1952). The trial judge's arbitrary refusal to grant at least *one* additional challenge before the voir dire or after Mrs. Lewis was examined resulted in the selection of an incompetent juror.

The trial court's action must not be affirmed under this point, if criminal Rule 24(b), supra, is to be effective in promoting the selection of a jury of twelve fair men.

POINT III.

(A) The Court Erred in Denying the Motion to Produce the Records of Security Guaranty Company.

(B) The Court Erred in Denying the Several Motions to Strike Testimony Relating to Security Guaranty Company.

(C) The Court Committed Fundamental Error in Allowing the Prosecutor to Suppress the Records of Security Guaranty Company Which Were Essential to a Proper Determination of the Cause.

(D) The Court Erred in Denying the Motion for Mistrial. (R. 4277) Based Upon The Court's and Prosecutor's prejudical Statements in Regard to the Records of Security Guaranty Company.

(E) The Court Erred in Denying the Motion for New Trial on the Grounds Relative to the Suppression of the Records of Security Guaranty Company.

As set forth in the Statement of the Case and Facts, Credit Finance Corporation's stock was purchased on or about April 1, 1960 (R. 3630-3638). Security Guaranty Company on or about July 22, 1960 was purchased by defendant Levine (Indictment, Count I).

The tremendous importance of all matters connected with Security Guaranty Company is immediately apparent by a reading of the indictment returned against defendant Levine. This indictment in paragraph two of the first count which alleges how the scheme to defraud was organized and came into existence states that Credit Finance

Company's stock was sold to Security Guaranty Company and that company in turn was purchased by defendant Levine on July 22, 1960.

To illustrate to the Court the importance of Security Guaranty Company's papers, books, and records, a resume of the testimony and argument concerning Security Guaranty Company will follow.

Referring to the proceedings at the trial we find S.E.C. agent Callahan testifying that to the best of his knowledge all of the records pertaining to Credit Finance Corporation and some of the records of Security Investment (sic) were in the courtroom (R. 1060, 1061).

Mrs. Hightower testified that Security Guaranty Company took over the records and bank accounts of Credit Finance Corporation on April 1, 1960 (R. 1698, 1709).

A Mr. Dey was permitted to testify that he was handed a prospectus from defendant Grene concerning Security Guaranty Company in April 1960 (R. 2257). He then testified that defendant Grene advised him that Security Guaranty was a new financial company, which was about to launch an extensive advertising campaign (R. 2259). Further testimony was to the effect that Security Guaranty Company entered into an advertisement contract with Mr. Dey's station in Orlando (R. 2264).

A Mr. Harrington from Pensacola, Florida, testified that Credit Finance Corporation had an office in Pensacola and that later the name on the office window was changed to Security Guaranty Company (R. 3202). He also stated that he wrote to a Mr. John Courson of the Security Guaranty Company concerning past due rent for

July, August and September 1960 (R. 3209). Mr. Harrington then testified that he was told by defendant Gradsky that Security Guaranty Company had purchased from Mr. Gradsky all the stock of Credit Finance Corporation (R. 3226).

Witness Robert Cunningham who was in the business of selling airplanes testified that Security Guaranty Company purchased a $17,000.00 aircraft from his company on July 6, 1960 (R. 3332).

Subsequently, Mr. Clarke, defense counsel for Mr. Grene moved to produce the records of Security Guaranty Company (R. 3411, 3412). The Court, notwithstanding the crucial need for the records of a company which allegedly ran the "show" from April 1960 to October 31, 1960, denied the motion (R. 3412).

The Securities Exchange Commission agent, Callahan, testified that as of June 1, 1960, the stock of Credit Finance Corporation was owned by Security Guaranty Company and that defendant Gradsky had a controlling interest in Security Guaranty Company (R. 3458). Mr. Callahan repeated this same testimony that defendant Gradsky had the controlling interest in Security Guaranty Company several more times (R. 3631-3633).

On page 3633 of the record Government agent Callahan testified that he saw the stock book of Security Guaranty Company and he testified as to the number of shares issued by such company and to whom the share were issued. He was then asked where he saw the stock book of Security Guaranty and he answered that he saw it right here in the building (R. 3634). He was asked if he had the book. He stated that he did not (R. 3634). When inquiry was

made of Mr. Callahan as to where the books and records of Security Guaranty Company were, he replied that the postal inspectors have the books (R. 3634). He went on to state that "Mr. Al Francis (a postal inspector) had possession of them and he left town *this morning* I believe to go over to Tampa and then to Miami." (R. 3634). He was then asked:

> "Q. Yes Sir. So then as far as this trial is concerned the books and records of Security Guaranty are not available?
>
> "A. No." (R. 3634).

Mr. Callahan again repeated his statements to the jury that Security Guaranty Company controlled Credit Finance Corporation from April 1, 1960 up to and including July 22, 1960 and that on or about July 22, 1960 there was a change in Security Guaranty's management (R. 3636, 3637).

Mr. Callahan also testified that defendant Glaser owned 129,000 shares of stock in Security Guaranty Company (R. 3782), but, of course, he did not have the stock book to support his testimony.

Callahan went on to state that the stock book of Security Guaranty Company reflected the above information, and he further admitted that the book in question is not in evidence (R. 3782). He then stated that the books of Security Guaranty Company were in the custody of the postal inspector (R. 3783). Mr. Callahan admitted that the records of Security Guaranty Company were at one time in possession of the United States Attorney's Office and that they were later turned over to postal inspector,

Al Francis, who was driving his automobile with the records from Tampa to Jacksonville (R. 3785-3787).

Notwithstanding the suppression of the evidence, witness Callahan was permitted to testify at length concerning the books and records of Security Guaranty Company (R. 3789-3800).

Mr. Callahan admitted that although he checked the records of Security Guaranty Company he made up the balance sheet of Credit Finance Corporation which was dated July 22, 1960, without using the Security Guaranty Company records (R. 3900, 3901). When asked again for the records of Security Guaranty Company, he stated as usual that the postal inspector Al Francis had them in his automobile (R. 3901).

A motion to strike Mr. Callahan's testimony upon the grounds that it was based on books and records not in evidence was denied by the court (R. 4029, 2030).

Attorney David Clarke, defense counsel for defendant Grene, testified that on the day of his appointment by the court to represent Mr. Grene, he requested the prosecutor to permit him to see the records of Security Guaranty Company (R. 4052). Mr. Clarke went to a room where the Security Guaranty records were being held by the Government and he recalls seeing an agreement and amendment to agreement between Security Guaranty Company, Credit Finance Corporation and Mining Royalty Company (R. 4053, 4054). He then testified that he had to discontinue his investigation of the documents of Security Guaranty Company because a Government agent asked him to leave the room. The agent stated that he would furnish copies of the documents he wanted (R. 4055). The

copies of the documents requested were never made by the Government agent as promised (R. 4055).

On cross examination Mr. Clarke testified that he was allowed to see the records for a period of 3 minutes before the room containing the records was locked (R. 4055, 4056). He further testified that he filed a mtion for the production of the records of Security Guaranty Company (R. 4058).

The harmful and prejudical errors of the Court in denying the motion to produce the records of Security Guaranty, in denying the motion to strike evidence relative to Security Guaranty Company and the fundamental error committed by the Court in permitting the prosecutor to deliberately and/or negligently suppress the records of Security Guaranty Company was further compounded by the following statement of the prosecutor in his final argument.

The prosecutor stated that all attorneys are officers of the Court and their obligation to the Court exceeds even their obligation to the client they are defending, "but yet in discussing the records of Security Guaranty Mr. Rosen said that Mr. Clarke filed motions a motion to produce those records. Well that isn't so. Nowhere in that motion is there any mention of Security Guaranty, but yet he went on to say that this Court and I got together and at the last moment denied Mr. Clarke's motion to produce."

At this point Mr. Rosen jumped to his feet stating that the motion had been denied. The trial judge before the jury stated that there isn't any such motion in the record and that Mr. Rosen was misinformed (R. 4269). The trial judge reemphasized the point by stating "There was never

such motion presented to me. Never such motion. Notwithstanding your statement." (R. 4270). The prosecutor went on to state that Mr. Rosen did not speak the truth and that Rosen stood up and questioned the integrity of the Court and of the prosecutor (R. 4270). Mr. Rosen made a motion for mistrial which was denied (R. 4277).

The statements by the court and by the prosecutor during argument were impermissible since they were not based upon prior proceedings and especially since they reflected on the sincerity of counsel for all defendants. Cf. *Wagner v. United States*, 263 F.2d 877 (5th Cr. 1959). The trial judge clearly committed reversible error by failing to grant the motion for mistrial.

It is fundamental in attaining fair judicial administration that the prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the Government disclose the truth so that justice may be done then that some advantage might accrue to the prosecution toward insuring a conviction. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

The requirement that the Government must prove its case beyond a reasonable doubt means, at the very least, that the Government itself should not, by any failure to disclose relative evidence, prevent the defendant from producing evidence which might create the reasonable doubt. Our standards of fair play in criminal proceedings require that the Government should present its evidence in its true colors and it should never be a party to withholding any evidence which materially bears on the credibility of

the witness it places on the stand. *United States v. Zborowski*, 271 F.2d 661, 668 (2nd Cir. 1959).

In the case of *United States v. Consolidated Laundries Corporation*, 291 F. 2d 563, (2nd Cir. 1961), forty-three documents came into the Government's possession and they were relevant to testimony given at the trial by one of the prosecution's witnesses. Before trial the prosecution was ordered to turn over to defense counsel all documents which were material to the proof of the issues in the case. None of the forty-three documents was turned over to the defendants. The Court held that where the Government becomes custodian of evidence it must keep the evidence in such a manner that it will be available for use upon the trial by all parties. The Court granted a new trial to the defendant because of the negligent suppression of material evidence by the Government.

In the instant case the papers, books and records of Security Guaranty Company were relevant to the criminal charges as is seen from a reading of paragraph two of count one of the indictment, wherein it is alleged that defendant Levine purchased Security Guaranty Company. The records of Security Guaranty Company were essential to the defendants in order to test the credibility of numerous witnesses and especially the credibility of Mr. Callahan who testified for a period of four days.

Defendant Levine was charged in the indictment with having taken over the operation of Security Guaranty Company; yet, he was denied access to the records of that company. Suppression of the evidence under the circumstances of this case is so fundamentally unfair as to amount to a denial of due process of law. Therefore, the trial court seriously erred in denying the motion for new

trial on the grounds that material records were suppressed by the prosecution and were testified to although not offered into evidence. The denial of the new trial was inconsistent with the correct administration of criminal justice in the federal courts, and it is this court's duty in its supervisory capacity, as an appellate court, to correct the injustice.

At the very least, the omission of the Government in not having available for trial evidence in its possession constitutes a negligent suppression of material evidence entitling the defendants to a new trial. The manner in which the evidence disappeared is highly suspicious. Even if we assume that the prosecutor's failure to produce the evidence was not the result of guile or a desire to prejudice matters little, for its impact was the same, presenting as it did, a trial that couldn't in any real sense be termed fair. See *Napue v. People of State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217.

In McNaughton's revised 1961 edition of Wigmore on Evidence, Volume 8, Section 2224, there is contained the following statement:

> "It seems wise to stand firm upon ordinary considerations of fairness, and to hold that the prosecutor is not entitled at trial to withhold from the inspection of the accused and the jury any documents or chattels relevant to the case unless they are otherwise privileged."

This Court has held that a summary of books is proper, but only where the original records are available. *Greenhill v. U.S.*, 298 F.2d 405 (5th Cir. 1962).

Defendant Levine is most aware that to retry this case

would probably consume another six weeks. But Defendant Levine did not have custody or possession of the papers, books and records of Security Guaranty Company. The prosecutor had such possession. It was the duty of the prosecutor to keep the evidence of which it was custodian in such manner that it would be available for use upon the trial by all parties. This duty was breached by the prosecutor or someone in the Government's employ. The failure to produce the records deprived all defendants of evidence which would have been helpful to them on points which were involved in determining their guilty. The fault and negligence can only be chargeable to one source—the Government.

It is respectfully submitted that the errors committed under this Point were most grievous and prejudical because the effect of the willful or negligent suppression of the records of Security Guaranty Company permeated the entire trial proceedings. No matter who is charged with the commission of a crime, the administration of justice must not only be beyond reproach, it must be beyond suspicion of reproach. This Court must not permit the action of the Government in literally driving evidence from the courtroom to be affirmed.

IV.

The Court Erred in Instructing the Jury That the Defendants Must Answer the Indictment or be Convicted.

The Court instructed the jury:

> "The indictment is a mere formal charge. The Grand Jury heard only one side. The Grand Jury returned an indictment, and the

> Grand Jury, of course, its thought was *unless there was an answer to it* . . . They should be put up on their trial . . . *and unless they answer they should be convicted.*" (R. 4298, 4299). (Emphasis Added).

The Fifth Amendment of the Constitution of the United States provides that "no person . . . shall be compelled in any criminal case to be a witness against himself . . ." Title 18 Section 3481 provides:

> "In trial of all persons charged with the commission of offenses against the United States . . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

This Court in its opinion of *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962) brilliantly depicted the history of the development of the privilege against self-incrimination. This latter statement is made with no intention of this writer to ingratiate himself with the Court. A perusal of the *DeLuna* case, supra, from pages 144 to 152 shows a thorough historical tracing of man's right to silence and the line of growth of the privilege against self incrimination. This Court stated:

> "The Supreme Court stands firmly for a broad view of the right. 'To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose.'"

As pointed out by this Court the right against self-incrimination is the result of successive accretions and it is more important to consider its line of growth as indicative of an expanding right capable of encompassing

new and novel situations today as in the past. If the expansion of the individual's right of silence comes at the expense of the power and efficiency of the state, that is but in accord with the nature of the right and its historical development.

It is basic that all the defendants in this case are to be accorded the benefit of the presumption of innocence and they should not be penalized or have that presumption discredited because they rely on a Constitutional right. Therefore, any comment on an accused's silence is improper for either the judge or prosecutor.

In the *DeLuna* case, supra, the Court extended the Constitutional guarantee of right of silence free from prejudicial comment to include comments coming from a co-defendant's attorney.

This Court in *Perez v. United States*, 297 F.2d 12, 16, held that under no condition is it permissible to leave with the jury the idea that it had become the duty of the defendant to establish his innocence to obtain an acquittal.

The Court's instruction that unless the defendants answered the indictment of the Grand Jury they should be convicted, was but another method to prejudically comment to the jury that the defendants did not take the stand. Defendant Levine contends that this particular instruction was even more prejudical than a mere comment concerning a defendant's failure to testify. It is more prejudical because the charge was to the effect that "*they should be convicted*" unless they answered the indictment of the Grand Jury. The error of the trial Court in this regard was so fundamental in its denial of due process

that this Court must reverse the judgment and sentence against defendant Levine and all other defendants in this case.

V.

The Court Erred in Admitting Charts of the Balance Sheet of Credit Finance Corporation and the Cash Flow Statement of the Gradskys Where Such Charts Were Based Upon Books and Records not in Evidence and Upon Personal Conclusions of a Government Employee.

George M. Callahan, the accountant for the Securities and Exchange Commission testified that he made an audit of Credit Finance Corporation from December 1958 until October 31, 1960 (R. 3436). He further stated that he prepared a balance sheet of Credit Finance Corporation showing the assets and liabilities of that corporation as of July 22, 1960 (R. 3485). Notwithstanding that the figures on the balance sheet allegedly reflected the financial condition of Credit Finance Corporation on July 22, 1960, Mr. Callahan admitted under cross examination that many of the figures placed upon the balance sheet were based upon events taking place long after July 22, 1960 (R. 3958, 3966).

In addition to the balance sheet prepared by Mr. Callahan, he also prepared what he labeled "summary of cash transaction with or for Norman Gradsky, B. J. Gradsky, their family and related corporations" (Gov't. Ex. 238B). This chart contained no notations as to the source of the information placed on the chart.

The expert accountant, Mr. Callahan, who was in the employ of the Securities Exchange Commission testified

repeatedly that he had omitted to credit certain items in the two charts he prepared, which items would have enhanced the assets of the Credit Finance Corporation (R. 3567, 3580, 3610, 3650). He admitted that he deleted items from the balance sheet without even checking to determine the value of the items. He simply struck these items which reflected assets of Credit Finance Corporation from the balance sheet based upon his own personal opinion (R. 3651, 3655, 3657, 3732, 3737, 3742, 3749).

He did not bother with the important agreement and amendment to agreement between Security Guaranty Company, Credit Finance and Mining Royalty Company which involved a transfer of property from Credit Finance Corporation and Security Guaranty Company to Mining Royalty Company in exchange for 519,000 shares of the latter's stock (R. 3895-3905).

Of necessity, in cases which involve a great number of account books and records, expert summary of numerous account books and records is proper. However, because of the intricacy and extent of detailed figures, massed in evidence against an accused man, he is sometimes placed in a perilous position. Experts are known to differ on theories of accounting and they are not unknown to assume the function of advocacy in anlysis or statement. It is also true that experts in accounting are not always free from error and mistake of fact in figuring as well as in their theory.

Many of the figures on the charts in question are not supported by the records in evidence. Furthermore, many items were deliberately left out of the balance sheet and many items were depreciated on the balance sheet without the expert accountant showing any basis for the deprecia-

tion except his own conclusions based sometimes on events that occurred a year or more after the date reflecting the preparation of the balance sheet. Under these circumstances a proper foundation for the admission of the two charts was not shown and the Court should have granted the objections of the defendants to the admissions of these charts which were placed before the jury. *Greenbaum v. United States*, 80 F.2d 113, 120 (9th C.C.A. 1935). *Lloyd v. United States*, 226 F.2d 9 (1955); *Greenhill v. U.S.*, 298 F.2d 405 (5th Cir. 1962).

VI.

The Court Erred in Denying the Motion for Judgment of Acquittal for Defendant Levine and in Denying the Motion to Strike as to Counts Three-Nine of the Indictment.

In seven of the counts of the indictment against defendant Levine, the alleged substantive acts occurred prior to the time defendant Levine was alleged to have joined the other defendants. The only overt act alleged in the conspiracy count as to defendant Levine was that on August 15, 1960, Levine induced Stella Grace Johnston to renew a $10,000.00 note and to increase her investment to $12,000.00. When Stella Grace Johnston was placed on the witness stand, she at no time identified the defendant Levine.

It was alleged in the indictment that George Levine became a part of the scheme when he purchased the Security Guaranty Company on July 22, 1960. There was not introduced into evidence a single record, book or paper of Security Guaranty Company to show any connection whatsoever between defendant Levine and Security Guaranty Company. Defendant Levine challenges the Government

to demonstrate to this Court or to show to this Court a single exhibit of Security Guaranty Company wherein defendant Levine is associated with that company. The indictment charges Levine as having purchased Security Guaranty Company. There is a total failing of proof to establish this critical and crucial allegation of the indictment.

Defendant Levine also respectfully refers the Court to that section of the Statement of the Case and Facts wherein it is shown that defendant Levine was not identified by the interminable queue of witnesses that took the stand. The Government's witness, Robert M. Palmer, testified that defendant Levine asked him to come to Orlando to check over the records of a finance company which he was interested in purchasing (R. 951-953). Mr. Palmer stated that he was hired by defendant Levine in order to determine that the finance business which he was interested in acquiring was in good order and that the operation was legitimate (R. 965).

There are statements by Mr. Callahan, the S.E.C. agent, that business operations terminated on October 31, 1960, or approximately three months after defendant Levine was alleged to have entered upon the scene.

When Callahan testified as to who was issued stock in Security Guaranty Company, at no time did he state that the stock book reflected that defendant Levine owned a single share of Security Guaranty Company's stock.

Notwithstanding all of the above, defendant Levine was found guilty of all ten counts and sentenced to a prison term of fifteen years.

VII.

Omnibus Point

Defendant Levine relies upon all specifications of error raised by the other defendants and their argument thereunder.

CONCLUSION

The defendant Levine is entitled, as clearly demonstrated under the foregoing specifications of error, to a judgment of acquittal or to a new trial.

Respectfully submitted,

Max Lurie
Attorney for Appellant,
George Levine
1409 Biscayne Building
Miami 32, Florida

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing brief of appellant George Levine was mailed to the United States Attorney, Federal Building, 300 N. E. First Avenue, Miami, Florida, this ..... day of July, 1964.

Max Lurie

APPENDIX E.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants.

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant George Levine in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant George Levine to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from April 9, 1965; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from April 9, 1965 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have

been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from April 9, 1965 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ELBERT P. TUTTLE,

CHIEF JUDGE.

Dated: (ORIGINAL FILED APRIL 19, 1965)

APPENDIX F.

(413)—Tuttle

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants.

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida
(APRIL 9, 1965)

ON PETITIONS FOR REHEARING
Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

PER CURIAM:

It is ORDERED that the petitions for rehearing filed by appellants Hogue, Roberts, Norman Gradsky, B. J. Gradsky, Robert Grene and Levine, be, and the same is, hereby DENIED.

APPENDIX G.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 19974

D. C. Docket No. 1271-Orl-Cr.

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants.

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for The Southern District of Florida.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons; the judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten; the sentences against Roberts on counts one, two, four, five, seven and nine are set aside; the judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten; the sentences against Schiff on counts one, three, four, five, six and seven are set aside; the judgment against Gibbons is affirmed as to the sentences on counts six and ten; the sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside; and that this cause be, and it is hereby remanded to the said District Court for further proceeding not inconsistent with the opinion and judgment of this Court.

March 11, 1965

Issued as Mandate:

APPENDIX I.

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

Title 15, United States Code Annotated, Section 77q(a), Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 18, United States Code Annotated, Section 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such

scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94.

Title 18, United States Code Annotated, Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency therof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $20,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Rule 24, paragraph (b), Federal Rules of Criminal Procedure. Trial Jurors

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is

entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.